Supreme Court, U.S.
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No. 98-1241

In The

Supreme Court of the United States

October Term, 1998

KEVIN M. McGUINNESS,
Petitioner,

vs.

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENNIS W. MONTOYA
LAW OFFICES OF DENNIS W. MONTOYA
P.O. Box 15235
Rio Rancho, NM 87174-0235
(505) 246-8499
(505) 246-8599 (Facsimile)
Attorney for Petitioner

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1. NEW ISSUES PRESENTED

- Whether, in light of the Court's acceptance of certiorari in *Sutton vs. United Airlines*, ___ U.S. ___, 119 S.Ct. 790 (*cert. granted* Jan. 8, 1999), a case in which the central issue is whether a disability should be assessed without regard to the availability of mitigating measures, this case should be held in abeyance pending the outcome of *Sutton*.

- Whether, in the alternative, and in light of the Court's acceptance of certiorari in *Sutton vs. United Airlines*, a case which addresses the issue of whether a physical disability should be assessed without regard to the availability of mitigating measures, this case, which addresses psychological disability in the same context, should be heard on certiorari and consolidated with *Sutton*.

- Whether Respondent's arguments that Petitioner has improperly characterized the record have merit.

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ADDITIONAL REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE CERTIORARI HAS BEEN GRANTED IN *SUTTON vs. UNITED AIRLINES*, A CASE WHICH ADDRESSES THE "MITIGATING MEASURES" ISSUE IN THE CONTEXT OF PHYSICAL DISABILITY

On January 8, 1999, which was close to the filing date of this petition, this Court granted a petition for writ of certiorari filed by the Plaintiff in *Sutton vs. United Airlines*, 130 F.3d 893 (10th Cir. 1998). ____ U.S. ____, 119 S.Ct. 790 (*cert. granted* January 8, 1999). Briefing is pending in that case.

Sutton was relied upon heavily by the Tenth Circuit in deciding the case at bar. *See* Tenth Circuit Opinion, Appendix A to Petition for Writ of Certiorari, at p. V-XI ("Under the law of this circuit, we must consider the plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity." Citing *Sutton*.)

In fairness to the Petitioner here, and in light of the granting of certiorari in *Sutton*, the Court should either grant certiorari in this case, which presents the companion issue of mitigating measures in the case of psychiatric disability, or hold this petition in abeyance pending the outcome of *Sutton*, and decide this case accordingly.

B. THIS COURT SHOULD GRANT CERTIORARI BECAUSE RESPONDENT'S ARGUMENTS THAT PETITIONER HAS MISCHARACTERIZED THE RECORD IN THIS CASE ARE DEVOID OF ALL MERIT.

Respondent, in its Response to Dr. McGuinness' petition for writ of certiorari, argues repeatedly that he has in various instances mischaracterized the record. These arguments are devoid of all merit.

As regards the existence of Petitioner's disability, it is law of the case. (See Tenth Circuit opinion, Appendix A to Petition, at p. 5-VII ("The parties agree that Mr. McGuinness has an 'anxiety disorder ....'")) Despite findings by both the trial court and the Tenth Circuit Court of appeals to this effect, Respondent attempts, in its Brief in Opposition, to rewrite the record with multiple misstatements, to wit:

(1) On page 1 of Respondent's Brief Petitioner's verified complaint is quoted where Dr. McGuinness 'asserted that he suffered from "an anxiety disorder." On page 4 of the very same Brief in Opposition, Respondent quotes Dr. McGuinness' verified complaint, once again, stating "the name of the disorder was "test anxiety"." In fact, Respondent takes the entire verified complaint out of context in an attempt to swindle this court.

The actual quote from Dr. McGuinness' verified complaint regarding his disorder is as follows:

> Plaintiff suffers with an anxiety disorder, and has had this condition at all times relevant to this complaint.

The actual quote from Dr. McGuinness' verified complaint regarding the context in which his disorder continued to require accommodation is as follows:

> Plaintiff sought reasonable accommodation from the defendant in the context of test anxiety.

Dr. McGuinness was addressing the context of his need for reasonable accommodation. He was not defining the scope or limits of his disorder.

(2) On page 3 of Respondents' brief it is reported that 'the suggestion was made that [Dr. McGuinness] visit with the medical school's clinical psychologist about his "test anxiety".' This is a clear device to trivialize the truth. In fact, Dr. McGuinness' verified complaint states:

> Prior to taking the Biochemistry course as a first-year students' required course, Plaintiff advised Dr. Reyes in October 1992 that Plaintiff had a clinical condition involving debilitating anxiety. Plaintiff described the symptoms of this condition and the impact of his condition upon his academic performance.
>
> After informing his instructor Dr. Reyes Plaintiff was referred to Dr. Michael O'Donnell, a

clinical psychologist on staff at the medical school, who was made aware of Plaintiff's disability.

Once again the facts are misrepresented to this court by the Respondent, not by the Petitioner.

(3) On page 3 of Respondent's brief Respondent attempts to lend to Dr. McGuinness its own misunderstanding of the differences between technical terms, such as "learning related disorders", "learning disabilities", "learning disorders", "anxiety disorders", etc. These are not terms that can be clearly understood without expert testimony. It cannot be assumed that the meaning ascribed to such terms by an expert forensic psychologist, such as Dr. McGuinness, is the same meaning that is understood by Respondent. Such decisions are reserved for a finder of fact after a full trial on the merits.

(4) There are many other deceptive devices used in the pages of Respondent's brief. The pattern is clear. Although Respondent alleges the it is Petitioner whose "rendition of the "facts," in his petition, includes unsupported statements, incomplete statements of fact, and new allegations, Respondents does not demonstrate any of these to this court. Yet, Respondent's statements to this court are demonstrably distorted or outright false.

Finally, as regards Respondent's argument that Petitioner has improperly included in Appendix C of his Petition a decision letter by the United States Department of Education, Supreme Court Rule 14(i)(ii) clearly calls for the inclusion of

opinions of administrative agencies and Supreme Court Rule 14(i)(vi) clearly calls for the inclusion of "any other material the petitioner believes essential to understand the petition." Respondent's vehement argument that Petitioner has acted improperly is therefore clearly without merit. Petitioner has merely included, in accordance with the rules, material which he feels will be useful to the Court in understanding the background of the case.

While it might be correctly argued that Respondent's accusations represent the continuation of what has been an unusually oppressive course of conduct by the University of New Mexico School of Medicine in defending this case, it is Petitioner's far greater concern that the issues addressed in the Petition, which are timely, clearly preserved and presented, and essential to the development of the law, be heard by the Court. Petitioner therefore does not wish to beleaguer the point of opposing counsel's conduct. Respondent's allegations regarding Petitioner's alleged mischaracterization of the facts of this case are without merit, and should have no bearing on the Court's decision herein.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant the petition on writ of certiorari. The Court is also respectfully requested to consider whether this case should be consolidated with *Sutton vs. United Airlines*, ____

U.S. ____, 119 S.Ct. 790 (*cert. granted* Jan. 8, 1999), or to hold this case in abeyance pending the outcome of *Sutton*.

Respectfully Submitted:

Dennis W. Montoya
MONTOYA LAW OFFICES
Attorney for Petitioner
P.O. Box 15235
Rio Rancho, NM 87174-0235
(505) 246-8499
(505) 246-8599 (Facsimile)

Also:

1905 Lomas Boulevard, NW
Albuquerque, NM 87104